No._____

In the Supreme Court of the United States

October Term, 1991

Michael J. Crosby, Defendant-Petitioner,

vs.

United States of America, Plaintiff-Respondent

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Michael J. Crosby
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Pro Se

Question Presented

1. Whether the Federal Rules of Criminal Procedure, case law, and the Constitution permit the trial in absentia of a defendant who is not present at the commencement, or any later stage, of his trial?

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for the Eighth Circuit

The Petitioner, Michael J. Crosby, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Parties to the Proceeding Below

United States of America

Michael J. Crosby

Opinion Below

The opinion of the Court of Appeals (Appendix A, infra, 1-15) is reported at 917 F.2d 362 (8th Cir. 1990).

Jurisdiction

The judgment of the Court of Appeals (Appendix B, infra, 1) was entered on September 30, 1991, nunc pro tunc to January 24, 1991.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions Involved

United States Constitution, Amendment V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . [and] to be confronted with the witnesses against him . . . ."

Statement of the Case

The district court tried Petitioner in absentia when he did not appear for trial on the scheduled starting date, October 12, 1988. The jury returned its verdicts on November 18, 1988, finding Petitioner guilty of twenty-five counts of mail fraud in violation of 18 U.S.C. 1341, convicting two co-defendants jointly tried of various mail fraud counts, and acquitting one jointly tried co-defendant.

On August 21, 1989, the district court sentenced Petitioner to four consecutive executed five-year terms, suspended imposition of sentence on three counts, and placed Petitioner on probation for five years. The probationary term was ordered to commence when Petitioner was completed his sentences on the other counts. As a condition of probation the court ordered Petitioner to pay restitution in the amount of $550,000 during the period of his probation. Petitioner is presently serving his sentences.

Petitioner appealed his convictions to the Eighth Circuit Court of Appeals. His convictions were affirmed by a panel of that

court, but his case was remanded to the district court for reconsideration of the restitution order. (See 8th Cir. opinion, App. A at p. 15 and App. D, Letter from 8th Cir. to counsel, dated Oct. 16, 1990). On remand the district court modified the restitution to $240,035. (See App. E, December 28, 1990 Order from district court resubmitting case to the 8th Circuit). On March 4, 1991, Petitioner filed a petition for rehearing with a suggestion for rehearing en banc on the issue of trial in absentia and the district court's failure to replace his attorney prior to trial because of an irreconcilable conflict. The Circuit Court denied the Petition in an order dated May 8, 1991. (See Appendix C).

The facts underlying Petitioner's convictions are not relevant to the issue on which he seeks the Writ, and the facts relating to his trial in absentia are stated in the Eighth Circuit's opinion at pages A2-3.

Reasons for Granting the Writ

The Eighth Circuit held that Mr. Crosby had waived his right to be personally present for his trial based on the trial court's findings that he knew when his trial was to begin and the inconvenience to the government and its witnesses if a separate trial had to be held for Crosby. Petitioner does not discount the seriousness of the dilemma a court faces when a defendant with apparent knowledge of his trial date does not appear for his trial, but there is no avoiding the plain fact neither this factor, nor the inconvenience of retrying the case later after the absent defendant returns, is relevant in applying Federal Rule of Criminal

Procedure 43(b), which states:

> (b) Continued present not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present
>
> > (1) Is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial . . .) (emphasis added).

The Writ should be granted because the Eighth Circuit has ignored the plain wording of Rule 43 and the analysis of the Supreme Court case that gave rise to the Rule, Diaz v. United States, 223 U.S. 442 (1912). Although application of Rule 43(b) may impose a hardship on courts, prosecutors, and witnesses, the Supreme Court in Diaz and the drafters of Rule 43(b) decided to place a defendant's right to be present at his trial ahead of these considerations. That other Circuit Courts of Appeal have on grounds of expediency refused to apply the Rule as written and have devised factors for determining whether a court may proceed with a trial in the absence of a defendant, factors that have no logical connection to the plain wording of Rule 43(b), simply does not justify ignoring the Rule. Our analysis of Diaz and Rule 43(b), which we provided to the Eighth Circuit panel that decided this case, makes this clear.

The drafters of Rule 43(b) relied on Diaz v. United States because it stated the current law concerning the permissibility of trials in absentia. See, Taylor v. United States, 414 U.S. 17, 19

(1973). Diaz had been charged with non-capital murder in the Philippines. On two occasions during the trial he voluntarily absented himself, expressly waiving his right to be present. Diaz, 223 U.S. at 453. A Philippine statute required a defendant's presence at arraignment, at plea of guilty and judgment, and entitled him to be present at every other stage of the proceedings Id. The issue on appeal was not whether Diaz voluntarily waived his right to be present, but whether, under the applicable statute, he had the power to absent himself Id.

As a further aid to reaching a decision, the Supreme Court looked to Section 5 of the Philippine Civil Government Act, which granted a criminal defendant "the right to be heard by himself and counsel . . . ." Diaz, 223 U.S. at 454. If the Act made Diaz's presence indispensable, it was irrelevant that the Philippine statute in question prevented a waiver, as it could not lessen the force of the Act, a superior law. The Supreme Court characterized the Act as similar to the Sixth Amendment right to be present at one's trial, and that because the Act was intended to embody the constitutional rights enjoyed by United States citizens, the Act should be interpreted just as the Sixth Amendment right to present at trial would be interpreted in the United States. 223 U.S. at 455.

The Supreme Court then reviewed United States law concerning trial in absentia and concluded that the prevailing rule was "that if, after a trial has begun in [the defendant's] presence, he voluntarily absents himself, this does not nullify what has been

done or prevent the completion of the trial . . . ." 223 U.S. at 455-56 (citations omitted). Thus, the Philippine statute requiring a defendant's presence at arraignment, plea, and judgment, and entitling him to be present him at all other stages, was to be applied in a fashion recognized and understood in the United States, that is, to permit the continuation of a trial of a defendant, who initially present, voluntarily absented himself. There can thus be no doubt that Rule 43, which incorporates Diaz,[1] does not permit the trial in absentia of a defendant not initially present. Numerous cases applying Rule 43 have read the rule exactly this way.[2]

---

[1] The language in Rule 43(b) that a defendant who voluntarily absents himself must have been initially present before trial can proceed in his absence is not surplusage or the result of inadvertence on the part of the Rule's drafters. Paragraph two of the original committee note to Rule 43 says:

> The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence, Diaz v. United States, 223 U.S. 442, 455 (1912). . . .

[2] Pearson v. United States, 325 F.2d 625, 627 (D.C. Cir. 1963); Cross v. United States, 325 F.2d 629, 631 (D.C. Cir. 1963); Cureton v. United States, 396 F.2d 671, 675 (D.C. Cir. 1968); United States v. Miller, 463 F.2d 600, 603 (1st Cir.); cert. denied, 409 U.S. 956 (1972); Government of Virgin Islands v. George, 680 F.2d 13, 15 (3rd Cir. 1982); Parker v. United States, 184 F.2d 488, 489 (4th Cir. 1950); United States v. Hernandez, 842 F.2d 82, 84 (5th Cir. 1988); United States v. Garcia-Turino, 458 F.2d 1345, 1346 (9th Cir. 1972); United States v. Hudson, 313 F. Supp. 422, 426, (D.C. Delaware, 1970). Although these cases do not involve the same factual scenario as Petitioner's case, that is, a defendant who was not initially present for the beginning of his trial, they discuss Rule 43 in a way that makes clear that it is not permissible to try a defendant who is not present at the commencement of his trial.

Significantly, Diaz expressly recognized the problem that defendants who have absented themselves can create for the judicial system, but it did not allow this to modify what it recognized as a clear-cut rule, namely, that a trial actually pending before a jury may proceed as to an absent defendant only if he was initially present:

> Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

223 U.S. at 458 quoting Falk v. United States, 15 App. D.C. 446 460-61 (1899), cert denied, 180 U.S. 636 (1901).

The Eighth Circuit, instead of applying Rule 43 as written and as it was intended to apply, followed the reasoning of United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976) to find that Petitioner's absence at trial, despite his knowledge of when the trial was to begin, plus the inconvenience to the government in retrying the case, equaled a waiver by Petitioner of his right to be present at trial. Peterson, however, clearly misreads Diaz in reasoning erroneously to the conclusion that knowledge of the trial date, plus inconvenience to the government and witnesses, constitutes a waiver.

The following quotation from Peterson proves that it misreads Diaz:

> [i]n speaking of a defendant's voluntarily absence, "after the trial has begun" the Diaz court was referring merely to the factual context in which that particular defendant's voluntary waiver occurred-i.e., after the commencement of his trial.

524 F.2d at 184.

This quote reveals that Peterson incorrectly reads not only Diaz, but the many cases Diaz cited when it concluded that the majority rule in the United States is that a defendant may be tried in absentia only if he has been initially present at his trial. 223 U.S. at 455-56 (citations omitted). It is true that the decision in Diaz did not specifically turn on whether the Diaz's absence occurred before or after trial began, but this was because the precise issue to be decided was simply whether the Diaz had the ability under the applicable Philippine statute to voluntarily waive his presence. However, in light of Diaz's clear statement of the limits on trials in absentia, the factual context in which Diaz's waiver occurred was certainly not irrelevant. If Diaz had absented himself before trial, the case undoubtedly would not have been decided the same way and the conviction would have been reversed because Diaz made it clear that a trial may proceed only as to a defendant who was initially present. 223 U.S. at 455.

Furthermore, Peterson ignores that a defendant's Rule 43 right (the antecedents of which are in the common law as well as the constitution) to be present at trial is intended to be broader than his constitutional right (rooted in the 5th and 6th Amendments) to be present at trial. United States v. Alessandrello, 637 F.2d 131,138 (3rd Cir. 1980), cert. denied, 451 U.S. 949 (1981). United States v. Brown, 571 F.2d 980, 986 n.5

(6th Cir. 1978).

Peterson, and the cases citing it or otherwise relying upon its line of reasoning, have thus ignored the very point about Diaz that led the Supreme Court Advisory Committee to draft Rule 43 in a way that specifically limits trials in absentia to defendants who voluntarily absent themselves after their trials commence. The decision in Peterson, and the other cases that reach the same result, as well as the panel opinion in this case, are therefore not well-founded in law and should not be followed.[3]

There is no question that our Constitution and our common law place such a high value upon a defendant's opportunity to observe all stages of his trial and to assist in his defense that it is willing to permit a trial to proceed in a defendant's absence only if that absence is voluntary. United States v. Gregorio, 497 F. 2d 1253, 1258-59(4th Cir. 1974), cert. denied, 419 U.S. 1024 (1974). Because the presence of a defendant at the beginning of trial helps guarantee that any later absence is voluntary, Rule 43(b) makes a defendant's initial presence indispensable to a continuation of the trial in his later absence. Because the Eighth Circuit's decision in Petitioner's case cannot be squared with the plain meaning of Rule 43(b) and its common law and constitutional antecedents, and because this issue is one this Court has not directly ruled upon and it is likely to reoccur, this Court should grant the writ.

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[3] We premise our argument that rehearing should be granted primarily upon the Eighth Circuit's opinion's incorrect application of Diaz and Rule 43. However, we point out that the panel opinion misconstrued at least one important fact in deciding that the District Court had proceeded reasonably in trying Crosby even though he was not initially present. The panel opinion states that the court delayed trial for five days trying to obtain Crosby's presence before deciding to proceed with the trial in his absence. This is not correct. The trial began on Wednesday, October 12, 1988. After Crosby did not appear that day, the court announced that it would wait until Monday, October 17, 1988 to decide whether trial should proceed in Crosby's absence (T. 35-40) The next day, Thursday, October 13, the District Court declared Crosby's bond forfeited and made Findings of Fact and Conclusions of Law that trial in absentia was appropriate (T. 63-65). The court then announced that trial would proceed on Monday, October 17 (Ibid). Thus, the court did not wait five days before deciding to proceed with the trial. Furthermore, because the court had earlier announced the trial would be in session only Monday through Thursday of each week (T. 34), the trial was in effect delayed only two days, Wednesday October 12, and Thursday, October 13.

Conclusion

I therefore respectfully request that the Court grant the Writ.

Dated: 11 Oct. 91

Michael Crosby

Michael Crosby

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-5450

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Minnesota.
Michael J. Crosby,	*	
	*	
Appellant.	*	

Submitted: May 18, 1990

Filed: October 16, 1990

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Michael J. Crosby did not appear in court on the date set for commencement of his criminal trial, was tried in absentia, and was convicted. The issues in this case revolve primarily around this somewhat unusual circumstance and whether Rule 43 of the Federal Rules of Criminal Procedure applies because Crosby was not present when the trial commenced. We hold that a defendant who does not appear for his criminal trial, including the commencement of it, waives the protections of Rule 43 and the rights incorporated in that rule. We affirm the conviction.

Crosby was charged, together with Martin Cheatham, James Sannes and Jack Cunningham, with numerous criminal offenses arising

A1

out of a fraudulent scheme in which customers paid for, but never received, silver commemorative medallions. The facts are set out in detail in United States v. Cheatham, 899 F.2d 747, 748-50 (8th Cir. 1990), and for the most part are immaterial to the issues presented in this case. It suffices to say that the case was set for trial on October 12, 1988. Crosby was present at a pretrial conference on August 15, 1988, when the court[1] advised counsel for all parties of the trial setting. On September 12, 1988, the clerk sent a notice to all counsel confirming the date. On September 30, 1988, Crosby was present at a pretrial conference and, again, the court notified the parties and attorneys of the October 12 trial date. At that time, Crosby's counsel informed the court that he had no objection to the October 12 trial setting. On October 7, the trial court heard various motions which Crosby made through his counsel, and again the trial setting of October 12 was referred to by court and counsel.

On October 12, 1988, Cheatham, Sannes and Cunningham and their counsel appeared, ready for trial. Crosby failed to appear. The district court ordered a warrant issued and executed. As the district court stated in its order entered on October 14, delaying trial until October 17, "all other counsel, all other parties, the judge, all court personnel, and 54 jurors were present and ready to commence trial." United States v. Crosby, No. 3-88 CR 40(1), slip op. at 2 (D. Minn. Oct. 14, 1988). The marshal's office informed the court and counsel it was unable to locate Crosby at his residence. The order delaying trial stated: "[A] search of his residence by the Marshals would indicate that the residence has been abandoned by the defendant Crosby." Id. at 2-3. The district court ordered Crosby's bond of $100,000 forfeited and found that Crosby "deliberately, voluntarily, knowingly, and without justification failed to be present at the designated time and place

[1]The Honorable Donald D. Alsop, Chief Judge, United States District Court for the District of Minnesota.

for the trial of the action." Id. The court further found that no evidence was presented as to the defendant's whereabouts and there was no reasonable probability that he could be located shortly or the trial rescheduled with Crosby in attendance. Id. Observing that the government had listed eighty-three potential witnesses and more than four-hundred proposed exhibits for the trial, the district court found that rescheduling posed extreme difficulties and that undertaking two separate trials would place a substantial burden on the government and the court. The court found that Crosby "voluntarily waived his constitutional right to be present during the trial" of the action and "[t]he public interest in proceeding with the trial in the absence of . . . Crosby outweigh[ed] the interest of the defendant Crosby to be present during the conduct of the trial. . . ." Id. at 4.

The trial commenced October 17, and the jury rendered a verdict November 18, 1988, finding Crosby guilty on twenty-five counts of mail fraud. Crosby was arrested on June 14, 1989 and later sentenced to four consecutive five-year terms on twenty-two of the counts; the trial judge suspended imposition of sentence on the three remaining counts, and placed Crosby on five years probation to commence upon completion of the sentences on the other counts, conditioned upon payment of $550,000 restitution to the victims during the period of probation. Insofar as other facts are material to the issues raised, they will be set forth with respect to each of the arguments.

I.

Crosby argues that Rule 43 of the Federal Rules of Criminal Procedure plainly requires his presence at the commencement of

trial as a prerequisite to continuing the trial in his absence.[2] He argues that Rule 43 incorporates preexisting law as set forth in Diaz v. United States, 223 U.S. 442 (1912). In Diaz, a criminal defendant voluntarily absented himself from his own trial on two separate occasions, but nonetheless consented that the trial should proceed without him. Id. at 445. Diaz appealed his conviction on the ground that his absences from trial prevented him from exercising his constitutional right to confront all witnesses who testified against him. The Supreme Court rejected Diaz's claim, relying on the prevailing rule that:

> [W]here the offense is not capital and the accused is not in custody, . . . if, after the trial has begun in his presence, [the defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Id. at 455 (citations omitted). Diaz dealt only with the situation where a trial had commenced and the defendant thereafter voluntarily absented himself.

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[2]Rule 43 provides in relevant part:

> (a) **Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) **Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> > (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial) . . . . (emphasis added).

In essence, Crosby's argument is based upon the plain language of Rule 43. Crosby interprets paragraph (b) of Rule 43 to say that before a court can try a criminal defendant in absentia, the defendant must have at least been present at the outset of the trial. Crosby recognizes that a number of other circuits have held contrary to his position, but criticizes the reasoning in those decisions and particularly their treatment of Diaz. He also points to the extreme prejudice resulting from his absence at trial. On the strength of these two points, Crosby asks us to set aside the district court decision and remand this case for a new trial.

This circuit has not yet dealt with the application of Rule 43 where a criminal defendant such as Crosby is tried and convicted in absentia. Other circuits facing the issue have allowed convictions to stand on a theory of waiver. We are persuaded that we should do likewise.

The notes of the advisory committee on rules make clear that the first sentence of Rule 43 is a restatement of existing law. Fed. R. Crim. P. 43, notes of advisory committee on rules (note 1). We are satisfied that the language of Rule 43 does no more than restate the holding in Diaz. The reasoning in Diaz applies equally to the factual circumstances in this case where the defendant fails to appear for commencement of trial, as it does in the situation where the defendant appears at the commencement and then absconds. In both cases, the defendant waives his Rule 43 right to be present during trial when he voluntarily absents himself from the courtroom.

In discussing this issue in Government of the Virgin Islands v. Brown, 507 F.2d 186, 189 (3d Cir. 1975), Judge Rosenn pointed out that Rule 43 was merely a paraphrase of the holding in Diaz. In Brown, the defendant was absent from court on the first morning of voir dire. He appeared in court that afternoon, made no

explanation for his earlier absence, and observed the remaining voir dire examination without making any objection. Brown was present throughout the remainder of his trial. Following conviction, Brown appealed to the Third Circuit, arguing that conducting the voir dire proceedings of the first morning in his absence violated his constitutional and statutory rights. The Third Circuit rejected his claim, holding that "Brown's willful absence from the voir dire examination . . . was knowing and voluntary, and that this voluntary absence was a waiver of both his constitutional and statutory right to be present at the commencement of his trial." Id. at 189.

We agree with Judge Rosenn that there are no talismanic properties "which differentiate the commencement of a trial from later stages." Id. In fact, the voir dire examination is probably not as critical as cross-examination of the key witnesses, which occurs in the later phases of a trial. It would be anomalous to attach more significance to a defendant's absence at commencement than to absence during more important substantive portions of the trial. Id. Judge Rosenn did note that the commencement of trial would take on special significance under the rule if the defendant did not know when the trial was to begin, since in that case he could not be said to have knowingly waived his right to be present. Id. In Brown, however, one of the conditions for the defendant's release on bail was that the defendant appear at the start of the trial. Thus, it was clear that the Brown defendant knew his trial date.

The facts in Crosby's case are identical in many respects to those in Brown. Both defendants were released from custody on bail before their trial. Both voluntarily failed to attend the beginning of trial and neither offered any explanation for his absence. Crosby knew beyond question that his trial would start on October 12. In Crosby's case, as in Brown, the district court

painstakingly outlined the times when Crosby received and acknowledged notice of that date.

Our decision to follow Brown is bolstered by the fact that other circuits have treated this issue in similar fashion. In United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976), the Fourth Circuit also concluded that a defendant's voluntary absence at the commencement of trial was a waiver under Rule 43 just as if the defendant had attended the beginning of a trial and then later absconded. The court reasoned that:

> [t]o permit a defendant, free on bail, to obstruct the course of justice by absconding without a compelling reason, after having received actual notice of the time and place of trial, is as inconsistent with the purposes of the rule as to permit a defendant to abscond after the trial has commenced. We therefore hold that a defendant may waive his right to be present at the commencement of his trial just as effectively as he can waive his right to be present at later stages of the proceedings.

Id. at 184.

The Second Circuit in United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir.), cert. denied, Santoro v. United States, 409 U.S. 1063 (1972), reached a similar conclusion, stating:

> Waiver of a constitutional right must be both "knowing" and "voluntary." A defendant who deliberately fails to appear in court does so voluntarily, and thus the important question is whether his absence can be considered a "knowing" waiver. We hold that it can. The deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried.

The Tortora Court did not hold that the district court should proceed in absentia in every case in which the defendant voluntarily absented himself, but that the decision of whether to proceed is "within the discretion of the trial judge, to be exercised only when the public interest outweighs that of the voluntarily absent defendant." Id. at 1210.

In United States v. Sanchez, 790 F.2d 245 (2d Cir.), cert. denied, 479 U.S. 989 (1986), the Second Circuit gave further guidance on the parameters of the district court's discretion to try a defendant in absentia. The Sanchez court wrote:

> [D]istrict judges must have broad discretion in determining whether to proceed with a trial in absentia . . . .
>
> In the present case, it is enough that, in a case with more than one defendant, Sanchez waived his right to be present by failing to appear without explanation and while on bail; that some reasonable steps, including a one-day continuation with notification to his attorney and the issuance of a bench warrant, were taken unsuccessfully in response to his non-appearance; that there was no reason to believe that the trial could likely soon be held with Sanchez present; and that severance would impose on the Government the burden of prosecuting two separate trials that would involve substantially the same evidence.

Id. at 251.

Read together, these cases provide the factors a district judge should consider when deciding whether to try a defendant in absentia. They include: the likelihood that the trial can take place with the defendant present, the difficulty of rescheduling, and the burden on the government and inconvenience to jurors of having to undertake two trials, particularly in a multiple defendant case. The district court carefully considered each of these factors before deciding to commence the trial without Crosby. It delayed the trial five days, trying to obtain Crosby's presence,

before finally concluding that it would be unable to secure Crosby. Rescheduling of this case would have greatly disrupted the court's schedule and imposed a burden on the witnesses by requiring many of them to appear a second time.[3] Some of the witnesses were elderly with attendant problems of memory loss and the possibility that they might die before the trial could be rescheduled. In light of these conditions, holding two separate trials, one for three defendants and the other if and when Crosby was found, presented the court and jurors with significant inconvenience. Following the analysis suggested by the Second and Fourth Circuits, we have no difficulty satisfying ourselves that Crosby waived his right to be present at trial and that the district court acted within its discretion in trying Crosby in absentia together with the other three defendants who appeared at trial.

II.

Crosby also contends that the district court erred in failing to remove court-appointed counsel Douglas Altman as Crosby requested in a motion on Friday, October 7, just five days before the scheduled start of trial. We are satisfied that Judge Alsop did not abuse his discretion in denying this last-minute request to remove.

Crosby had attempted to discharge Altman in a motion twenty-nine days earlier, citing at that time a long list of issues on which Crosby and his counsel did not agree. At the previous hearing Altman also asked for permission to withdraw from the case. Magistrate Janis Symchych denied both requests, pointing out that Crosby was not entitled to select the individual attorney who would represent him when he was served by court-appointed counsel.

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[3]The government had subpoenaed eighty-three witnesses, including witnesses from Virginia, rural Alabama, Wyoming, Iowa, Nebraska, North Dakota, Texas, New York, and Canada.

United States v. Crosby, No. CR 3-88-40, slip op. at 1 (D. Minn. Sept. 23, 1988). Just as Crosby could not select his appointed counsel, he was also not at liberty to discharge that attorney. Id. Magistrate Symchych also concluded that the issues Crosby listed did not raise concern about ineffective assistance of counsel and that Altman could be prepared for trial by October 12. Id. at 1-2.

Shortly before trial, in a hearing before Judge Alsop, Crosby renewed his earlier motion to remove Altman. At that time, Altman again moved for permission to withdraw from the case. Judge Alsop heard the motions in camera and also denied both requests.

In United States v. Hart, 557 F.2d 162, 163 (8th Cir.), cert. denied, 434 U.S. 906 (1977), we held that a district court has broad discretion when determining whether substitution of counsel is warranted. "The trial court, when confronted by such an allegation, has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction." Id. But, "[t]he right to effective assistance of counsel may not be improperly manipulated by an eleventh hour request to obstruct the orderly administration of justice." Id.

It is evident that there were disagreements between Crosby and his counsel. In denying Crosby's second motion to remove, Judge Alsop made a thorough investigation of the conflicts between Crosby and Altman, and made every reasonable effort to resolve them. Most of the difficulty seemed to be over Crosby's concern for obtaining financial documents he believed were necessary to his defense. In particular, there were two areas of concern. First, Crosby claimed that his attorney failed to use court-appointed accounting services to prepare financial summaries of documents stored in Crosby's

garage.[4] Second, Crosby believed that financial records stored in a warehouse in California were also critical to his defense. He complained that Altman would not help him arrange to retrieve these records.[5]

Judge Alsop made every effort to provide a remedy. He had already previously authorized funding for Crosby and his codefendants to employ a professional accountant in preparation for trial. The judge extended the scope of that funding so that Crosby could have the same accounting firm provide whatever additional services Crosby needed with respect to the disorganized financial records. In addition, he arranged for Crosby, if necessary, to personally fly to California to retrieve whatever records were stored there.[6] We are persuaded, as was Judge Alsop, that these two solutions resolved all significant conflicts between Crosby and Altman.

Crosby makes clear that he raises no claim of ineffective assistance of counsel, reserving this for later presentation. The record reveals that Crosby's counsel called numerous witnesses from all parts of the United States and vigorously presented a defense for Crosby. Crosby's counsel spent two days and questioned eight witnesses as part of Crosby's defense. The witnesses were from

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[4]For at least six weeks before trial Crosby assured Altman that Crosby's father was organizing these records. This turned out to be untrue. Crosby did not inform Altman about the true state of these records until very close to trial. For this reason, Judge Alsop was less than sympathetic when Crosby attempted to lay blame on his attorney for failing to adequately prepare these records.

[5]Crosby contended that these California records were stored randomly throughout a warehouse along with furniture and other papers, and that he was the only person who could identify the relevant items. A problem arose because the conditions of Crosby's bail did not permit him to leave Minnesota. Crosby complained that Altman did not do whatever was necessary to remove this travel restriction.

[6]The record does not reveal whether Crosby went to California.

California, Canada, South Dakota, Texas and Virginia. The defense denied all allegations of fraud and attempted to show that Crosby was merely a poor administrator legitimately trying to establish a non-profit business. The accounting testimony, Crosby's primary bone of contention with respect to the removal of Altman as counsel, was not presented by any of the defendants' counsel. The government's case contains strong evidence against Crosby, including the fact that he received the major share of the proceeds of the fraudulent scheme and controlled the money, and substantial evidence of personal expenditures by Crosby, totaling some $260,000, while bills of the business went unpaid. While there were difficulties between Crosby and his lawyer, there is no evidence in the record of a breakdown in communication or that Altman was prevented from adequately presenting a defense. See United States v. Wagner, 834 F.2d 1474, 1482 (9th Cir. 1987); Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987), aff'd in part, 484 U.S. 231 (1988). The decision whether to remove counsel was completely within the district judge's discretion. We are satisfied that Judge Alsop did not abuse his discretion in this case by denying Crosby's request.

III.

Crosby also argues that he was prejudiced when counsel for defendant Cheatham questioned his brother Phillip Krzyzaniak, regarding whether Crosby knew when the trial was to begin and that he was supposed to be there. When Krzyzaniak took the stand, Cheatham's counsel indicated that he intended to examine Krzyzaniak on a number of issues, but the district court carefully limited the examination to Crosby's knowledge of the trial dates, the fact that he had planned to show up and that he did not. The district court ordered counsel not to examine the witness concerning the bond and who put it up, but that only "flight" evidence was admissible. In his reply brief Crosby argues that admission of evidence of flight requires a showing of immediacy linking flight to the time of

commission or accusation of the offense charged. Crosby claims that evidence probing his voluntary absence from trial does not qualify as flight evidence because it fails this immediacy requirement. He further claims that his absence from trial is irrelevant when determining his guilt or innocence since the absence was not related in time to either the time of the alleged offense or the time of accusation.

We are not convinced by the argument. As the Sixth Circuit explained in United States v. Touchstone, 726 F.2d 1116, 1119 (6th Cir. 1984):

> "[F]light" is generally admissible as evidence of guilt, and . . . juries are given the power to determine "how much weight should be given to such evidence." United States v. Craig, 522 F.2d 29, 32 (6th Cir. 1975), . . . [I]mmediacy "generally only becomes important in those cases where the defendant does not know, or his knowledge is doubtful, about the charges and accusations made against him." United States v. Hernandez-Miranda, 601 F.2d 1104, 1106 (9th Cir. 1979).

See also United States v. Peltier, 585 F.2d 314, 322-24 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979) (discussing the probative value of flight evidence in determining guilt or innocence). Because Crosby knew the charges against him and his scheduled trial date, there was no abuse of discretion in admitting this evidence.

IV.

Crosby's final argument is that the district court erred in conditioning probation on restitution of $550,000 to the victims of his fraud. He argues that the full $550,000 is not properly related to the offenses for which he was convicted. Crosby cites in his defense United States v. Missouri Valley Construction Co., 741 F.2d 1542 (8th Cir. 1984) (en banc), in which this court stated:

> [W]here a defendant has been charged with crimes against several persons, but convicted on only some of the counts, the court may not order the defendant, as a condition of probation, to make payments to any persons who were not aggrieved by the precise acts charged in those counts on which conviction was had.

Id. at 1547. He argues that under Missouri Valley, the court can only sentence him to pay restitution to those forty-two victims who were expressly named in the indictment. Crosby's reading of Missouri Valley fails to recognize the true issue in that case. In Missouri Valley, the defendant corporation pled guilty to criminal conspiracy. In its sentence, the district judge imposed "as a condition of probation, in lieu of a fine, the requirement that [the corporation] contribute money to a charitable organization that [had] not suffered actual damages or loss from the corporation's criminal offense." Missouri Valley, 741 F.2d at 1544.[7] We vacated the sentence because it required the defendant to pay restitution to someone other than a party "who suffered losses 'caused by the offense for which the conviction was had.'" Id. at 1547.

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[7]The district judge imposed sentence pursuant to 18 U.S.C. § 3651 (1982 & Supp. II 1984) which was repealed, Act of Oct. 12, 1984, Title II, c. II, § 212(a)(2), 98 Stat. 1987, but which still applies to offenses committed prior to November 1, 1986. The relevant portion of § 3651 states:

> The court may revoke or modify any condition of probation, or may change the period of probation.
> . . . .
> While on probation and among the conditions thereof, the defendant--
> May be required to pay a fine in one or several sums; and
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . .

While Missouri Valley is not helpful to us, three days after the case before us was argued, the United States Supreme Court held in Hughey v. United States, 109 L. Ed. 2d 408 (1990), that a restitution order under 18 U.S.C. § 3579(a)(1) (1982) is limited to losses caused by the conduct underlying the offense of conviction.

Judge Alsop in his restitution order stated that the total loss for the twenty-five counts for which Crosby was convicted was $291,303. Should the court be without authority to order restitution in the amount of $550,000 for the 412 victims, we believe that under the principles of Hughey the $291,303 restitution figure is undoubtedly sustainable. We are satisfied, however, that the appropriate course is to remand the case to the district court for further consideration of its restitution order in light of Hughey. This panel will retain jurisdiction of this appeal. If either party is aggrieved after the entry of the district court's order reconsidering the restitution award in light of Hughey, we will give further consideration to this issue on an expedited basis.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-5450MN

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
vs.	*	District Court for the
	*	District of Minnesota
Michael J. Crosby,	*	
	*	
Appellant.	*	

JUDGMENT NUNC PRO TUNC

The judgment of the district court is affirmed. This judgment is entered nunc pro tunc to January 24, 1991, the date appellant notified this court of his agreement with the district court's amended judgment and commitment order entered after this court's opinion of limited remand.

Appellant filed a petition for rehearing on other issues, which was denied May 8, 1991. The filing of a petition for rehearing presupposes the existence of a final panel decision and the entry of judgment of this court as required by Rule 36 of the Federal Rules of Appellate Procedure. The record is hereby corrected to show entry of judgment.

September 30, 1991

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

B1

AMENDED

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-5450 MN

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition
vs.	*	For Rehearing and Suggestion
	*	For Rehearing En Banc
Michael J. Crosby,	*	
	*	
Appellant.	*	

Suggestion for rehearing en banc, filed by the appellant, has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Chief Judge Lay, Judge McMillian and Judge Arnold voted to grant the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

May 8, 1991

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

C1

ited States Court of Appeals
For the Eighth Circuit

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

(314) 539-3600
FTS: 262-3600

October 16, 1990

Mr. Mark D. Nyvold
3989 Central Avenue, N.E.
Minneapolis, MN 55421

Re: 89-5450MN United States v. Michael J. Crosby

Dear Sir:

Enclosed is a copy of the opinion filed today in the referenced case. This appeal is a limited remand to the district court and the district court will certify its findings to this Court.

Sincerely,

Robert D. St. Vrain

Robert St. Vrain
Clerk of Court (EA)

Enclosure

cc: James E. Lackner
Francis E. Dosal, Clerk (Crim. 3-88-40 (01)
(cert. copy to district court)

D1

AO 72
(Rev. 8 82)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATES OF AMERICA, 3-88 CR 40(1)

Plaintiff,

v. **ORDER**

MICHAEL J. CROSBY,

Defendant.

Pursuant to the mandate of October 18, 1990, the above entitled action is resubmitted to the Court of Appeals of the Eighth Circuit.

DATED: December 28, 1990.

Donald D. Alsop

DONALD D. ALSOP
Chief U. S. District Judge

E1

137

FILED 12-28-90
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTERED
DEPUTY CLERK'S INITIALS

United States Court of Appeals
For the Eighth Circuit

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

(314) 539-3600
FTS: 262-3600

January 9, 1991

Mr. James E. Lackner
Assistant U. S. Attorney
234 U. S. Courthouse
110 South Fourth Street
Minneapolis, MN 55401

Mr. Mark Nyvold
3989 Central Avenue, N.E.
Minneapolis, MN 55421

Re: No. 89-5450MN United States of America v. Michael J. Crosby

Dear Counsel:

The Court has received a copy of the district court's December 28, 1990 Amended Judgment and Commitment Order in this case. As you know, this Court's opinion of October 16, 1990 indicated that the Court would retain jurisdiction over the appeal and that either party could ask the Court for further consideration of the matter.

In order to expedite completion of the proceedings in this appeal, the Court has asked me to contact you and ask whether you intend to seek further review of the matter. I would appreciate it if you could respond to this letter by January 20, 1991.

Please feel free to contact me if you have any questions.

Sincerely,

Michael E. Gans
Chief Deputy

MEG/dm

F1

January 21, 1991

Clerk of Court
Eighth Circuit Court of Appeals
1114 Market St.
St. Louis, MO 63101

Re: No. 89-5450MN U.S.A. v. Michael Crosby

Dear Sir:

On behalf of the Appellant I am writing to say that we agree with the December 28, 1990 Amended Judgment and Commitment Order entered by the District Court and we will seek no further consideration of the issue which that order concerns.

Please notify us, however, when judgment is entered by the panel that heard the case as we do intend to seek rehearing on other issues.

Sincerely,

Mark D. Nyvold

G1

United States Court of Appeals
For the Eighth Circuit

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

(314) 539-3600
FTS: 262-3600

February 15, 1991

Mr. Mark D. Nyvold
386 N. Wabasha
Suite 1300
St. Paul, Minnesota 55602

Re: 89-5450MN United States v. Michael J. Crosby

Dear Mr. Nyvold:

I have brought your letter of January 21, 1991, to the panel's attention, and I have been instructed to inform you that your petition for rehearing should be filed by March 4, 1991.

Please feel free to contact me if you have any questions.

Sincerely,

Michael E. Gans

Michael E. Gans
Chief Deputy Clerk

MEG/ea

cc: James Lackner
Joan Lancaster

H1

MARK D. NYVOLD
ATTORNEY AT LAW
Suite 1300
386 North Wabasha
St. Paul, Minnesota 55102

Telephone
(612) 291-8044

October 11, 1991

RECEIVED
OCT 21 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mr. William Suter
Clerk of Court
United States Supreme Court
Washington, D.C. 20543

Re: Crosby v. U.S.A.

Dear Mr. Suter:

This letter accompanies Petitioner Crosby's Petition for a Writ of Certiorari. I represented Mr. Crosby before the Eighth Circuit Court of Appeals pursuant to an appointment under the Criminal Justice Act of 1964. Because I am not a member of the bar of this Court, Mr. Crosby has signed his Petition pro se, although I prepared most of it. I would appreciate being advised of the decision on the Petition.

I would also like to add a brief statement to assist the Court in determining the timeliness of the Petition, should any question arise in that area. As the Court will note, the Eighth Circuit's judgment was entered September 30, 1991, nunc pro tunc to January 24, 1991. Mr. Crosby's petition should be considered timely because September 30, 1991 was the earliest date he could have filed his Petition.

The Appendices to the Petition make it clear why the Petition could not have been filed any earlier. When the Eighth Circuit decided Mr. Crosby's appeal, they remanded the case to the district court for reconsideration of the restitution issue. (See Opinion, App. A at 15). The district court completed its review and on December 28, 1990 resubmitted the case to the Eighth Circuit (App. E1). Because no judgment had been entered, I wrote to the Eighth Circuit on January 21 to say that Mr. Crosby agreed with the action the district court had taken on remand and to ask the Circuit Court for notification as to when judgment would be entered as Mr. Crosby would be seeking rehearing (App. G1).

The Eighth Circuit responded to me by letter, dated Feb. 15, 1991, informing me that a petition for rehearing, if any were to be filed, would be due March 4, 1991. The Circuit Court did not then enter judgment nor state when it would be entered. (App. H1).

I filed a petition for rehearing on March 4, 1991, and received a decision on it on May 8, 1991 (App. C1). The Circuit Court still had entered no judgment.

After receiving the Eighth Circuit's decision deny rehearing, I computed the date upon which a Petition for Cert. would have to be filed to be timely. That date was August 6, 1991. As that date approached I realized that judgment still had not been entered in Mr. Crosby's case, and that without a judgment I could not file a Petition for Cert.

I then contacted the Clerk's office at the Eighth Circuit on August 2, 1991, to inform them that Mr. Crosby and I were considering whether to file a Petition for Cert. but that if we were to do so we would need a judgment to petition from. I also told the Clerk's office that a judgment would have to be entered in any event. The clerk I spoke to, Ella Aublee, said the matter would be submitted to the Circuit Court.

When judgment was entered, it was entered nunc pro tunc to January 24, 1991. The judgment itself explains the reasons for this. Mr. Crosby and I have no objection to this if it does not prejudice his right to seek a Petition for a Writ of Cert. nor interfere with his right to seek, within 120 days after the Supreme Court denies the Petition or completes review of his case, a motion for reduction of sentence under Rule 35, Rules of Federal Criminal Procedure (Mr. Crosby falls under the old Rule 35 and can file the motion on his own without Government consent).

Obviously, the Eighth Circuit was not thinking about the possibility that entering judgment nunc pro tunc might preclude Mr. Crosby from filing a Petition for Cert. and subsequently a Rule 35 motion, and just as obviously its action should not be construed to have that effect. Mr. Crosby has proceeded in timely fashion throughout the appellate process and his Petition should be considered timely now.

Please contact me if I can be of further assistance, but I believe this letter and the documents appended to the Petition should clear up and question that may arise as to timeliness.

Sincerely,

Mark D. Nyvold

Mark D. Nyvold

cc: Solicitor General
AUSA Joan Lancaster
Michael Crosby.